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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 704

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

COMMENTS OF
CONSUMERS UNITED FOR RAIL EQUITY

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COMMENTS OF CONSUMERS UNITED FOR RAIL EQUITY

In its Notice served October 25, 2010 in this proceeding, the Surface Transportation Board ("Board") so ught comments on its commodity, boxcar, and TOFC/COFC (*i.e.*, class-wide) exemptions. Consumers United for Rail Equity ("CURE") hereby submits these Comments in response to the Notice.

Interest of CURE

CURE is an incorporated, non-profit advocacy group with the primary objective of advocating federal rail policy favorable to rail-dependent shippers, many of whom are often referred to as captive rail customers or captive shippers. CURE is sustained financially by the annual dues and contributions of its members, who are individual captive rail customers and their trade associations. Included in CURE are electric utilities that generate electricity from coal, chemical companies, forest and paper companies, cement companies, agricultural entities, various manufacturers and national associations, including both trade associations and associations of governmental institutions whose members work to protect consumers. The exemptions that are the subject of this proceeding are relevant to some, but not all, CURE members.

Background

In its Notice (at 2-3), the Board explained its view of the legislative history leading up to Congressional adoption of the exemption provision in the Interstate Commerce Act:

"The exemption provisions pertaining to railroads first adopted in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (1976) (4R Act), and later modified in the Staggers Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980) (Staggers Act), fundamentally changed the economic regulation of the railroad industry by the Board's predecessor, the Interstate Commerce Commission (the Commission). Prior to 1976, the Commission heavily regulated the industry. The Commission focused its regulation on ensuring equal treatment of shippers, which in some instances, led to railroad pricing decisions based on factors other than market considerations.

"By the early 1970s, the railroads were in financial decline. In an effort to revitalize the struggling railroad industry, Congress enacted the 4R Act and, 4 years later, the Staggers Act. In both statutes, Congress reduced the Commission's oversight of railroads through various means, including the statutory exemption provisions of 49 U.S.C. § 10505. Under § 10505, which was enacted in the 4R Act and modified in the Staggers Act, Congress directed the Commission to exempt railroad activities when it found that regulation was not necessary to carry out the national rail transportation policy (RTP) of 49 U.S.C. § 10101, and either: (1) the exemption was of limited scope; or (2) regulation was not necessary to protect shippers from abuse of market power. (These exemption provisions are now contained in 49 U.S.C. § 10502.) In the Staggers Act, Congress directed the Commission to pursue exemptions aggressively, and to correct any problems arising as a result of the exemption through its revocation authority."

The Board then recounted how its predecessor, the Interstate Commerce Commission, responded to the statutory exemption provision:

"Consistent with that Congressional directive, the Commission exempted numerous commodities, services, and types of transactions from regulation. In its first "commodity" exemption, in Rail General Exemption Authority—FreshFruits & Vegetables, 361 I.C.C. 211 (1979), the Commission exempted certain fresh fruits and vegetables from its regulations, based largely on its conclusion that the rail market share of movements of these goods, which were subject to strong

> competitive forces, was minimal and declining. Since then, the agency has exempted numerous other individual commodities, listed in 49 C.F.R. §§ 1039.10 and 1039.11, after finding that traffic for these individual commodities was sufficiently competitive and that railroads lacked sufficient market power such that abuse of shippers was not a substantial threat. The Commission also exempted rail (and truck) operations provided in connection with intermodal (TOFC/COFC) services, under 49 C.F.R. pt. 1090, and the rail transportation of all commodities in single-line boxcar service, under 49 C.F.R. § 1039.14."

The Board then provided its own view of the history of the ICC's grant of the exemptions at issue in this proceeding:

> "These ag ency exemption decisions were instrumental in the U.S. rail system' s transition from a heavily regulated, financially weak component of the economy into a mature, relatively healthy industry that operates with only minimal oversight. The transition, however, was not without challenges, sometimes because an exemption under § 10502 excuses carriers from virtually all aspects of regulation, even though the Board's continuing jurisdiction over exempted movements also extinguishes any common law cause of action regarding common carrier duties. Thus, for exempted movements, rail customers could pursue legal remedies under the Interstate Commerce Act only if they successfully petitioned the agency to revoke the exemption under 49 U.S.C. § 10502(d)."

Finally, the Board responded to criticisms of the exemptions, in recent years, by saying this:

> "As long as 30 ye ars have passed since the adoption of many of these exemptions. In recent years, the Board has received informal inquiries questioning the relevance and/or necessity of some of the existing commodity exemptions, given the changes in the competitive landscape and the railroad industry that have occurred over the past few decades. The Board will, therefore, hold a hearing to explore the continuing utility of and the issues surrounding the categorical exemptions under § 10502, specifically the various commodity exemptions under 49 C.F.R. §§ 1039.10 and 1039.11, the boxcar exemptions under 49 C.F.R. § 1039.14, and TOFC/COFC exemptions under 49 C.F.R. pt. 1090. The Board seeks comments as to the effectiveness of these exemptions in the marketplace; whether the rationale behind any of these exemptions should be revisited; and whether the exemptions should be subject to periodic review."

Comments

1. It Is Appropriate for the Board to Reconsider These Exemptions. CURE thanks the Board for opening this proceeding and engaging in a process to determine whether certain current class-wide exemptions should be allowed to continue in effect. CURE believes this review by the Board is long overdue, because, as the Board stated in its Notice,

> "an e xemption under § 10502 excuses carriers from virtually all aspects of regulation, even though the Board's continuin g jurisdiction over exempted movements also extinguishes any common law cause of action regarding common carrier duties. Thus, for exempted movements, rail customers could pursue legal remedies under the Interstate Commerce Act only if they successfully petitioned the agency to revoke the exemption under 49 U.S.C. § 10502(d)."

Under § 10502(a), class exemptions are to be granted only where (1) the service is not necessary to carry out the national Rail Transportation

Policy goals (at 49 U.S.C. § 10101) and (2) the service is limited in scope or regulation is not necessary to protect railroad customers against railroad market power abuse. It is clear that, at a minimum, significant market changes have occurred since the ICC/STB decided to exempt various classes of traffic, not the least of which is the substantial consolidation of the freight rail industry that has occurred since the 1980s. Yet, these exemptions have continued without Board review. For example, broad swaths of traffic are now covered by exemptions (e.g., all inter-modal service, much of which today moves in unit-train service over long distances with very limited inter- or intra-modal competition). Also, individual rail customers may have movements that do not occur in a competitive market; under such circumstances, the movement may encounter an unreasonable rail rate or an unreasonable rail practice for which there is only a remedy in law (and even there, federal preemption principles may dramatically restrict available relief). Yet, because the movement is covered by a class exemption, the rail customer cannot gain access to the Board to exercise its legal rights unless the Board revokes the exemption in whole or in part. The need to obtain a revocation of an exemption, either for the matter in question or more broadly, is a barrier that discourages the rail customer from approaching the Board, thus denying the rail customer access to the legal remedies provided by law. CURE believes that rail customers should be permitted to pursue "legal r emedies under the Interstate Commerce Act" without the necessity

of also persuading the Board to revoke (in whole or in part) an exemption under 49 U.S.C. § 10502(d).

As the Board is well-aware, Section 205 of S. 2889, the STB Reauthorization bill that was developed by the bipartisan leadership of the Senate Commerce, Science and Transportation Committee in consultation with the freight rail industry and rail customers and was ordered reported in December, 2009 by the Senate Commerce, Science and Transportation Committee, contains an approach to this issue that earned the support of the bipartisan leadership of the committee and, eventually, the entire committee. Section 205 would require the Board to revoke an existing exemption when it finds that application of any part of the Interstate Commerce Act "is necessary to carry out the transportation policy of section 10101 of this title or to protect shippers from the abuse of market power."

S. 2889 would require that the Board (a) conduct a study of class exemptions within two years after the date of enactment, (b) conduct a proceeding such as this one to provide the opportunity for public notice and comment, and (c), " [u]pon completion of the study, the Board shall -- (1) revise any such exemptions as necessary on the basis of the Board's findings and conclusions from the study," and "(2) establish a process for the periodic review, and revision as necessary, of class exemptions."

2. Class Exemptions Were Not in Fact "In strumental" To Improving the Financial Health of the Railroad Industry; Rather, the Ability of the

Railroads to Avoid Most Rail-to-Rail Competition, with Resulting Robust Pricing Power over Captive Rail Customers and the Ability to Shift Costs from the Carrier to the Customer, Has Led to Current Robust Financial Health. CURE cannot let this opportunity pass without challenging the historical accuracy of one of the Board's s tatements in the Notice. The Board stated that "T hese agency exemption decisions were instrumental in the U.S. rail system' s transition from a heavily regulated, financially weak component of the economy into a mature, relatively healthy industry that operates with only minimal oversight." On the contrary, CURE believes it is self-evident that it is was not the exemptions *per se,* but rather the unrestrained market pricing power of the freight railroads that has resulted in not only robust railroad health, but excessive financial health, as shown in the September 15, 2010 Report prepared by the staff of the Senate Commerce, Science and Transportation Committee.[1] The exemptions were not necessary for railroads to increase rates, if the rates on a commodity were generally low (*i.e.,* below the Board' s "jurisdictional th reshold" of 180 percent of the variable costs of the movement), or if there was effective competition available, because the rates and charges would not have been subject to the Board' s jurisdiction in either event. Clearly, the Board does

[1] "The Curr ent Financial State of the Class I Freight Rail Industry," Senate Commerce Committee, Office of Oversight and Investigations Majority Staff, issued September 15, 2010. The Report is available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=76823478-a901-4b4d-869b-9301bb43343b.

not need to grant an exemption immunizing an entire commodity group or service from all regulation to allow the railroad industry the opportunity to be financially healthy. The Board is authorized to regulate only where and to the extent necessary; the law requires that reasonable rates, as determined by the Board, be prescribed at a level that is sufficient to allow railroads to earn adequate returns.

3. The Financial Condition of the Railroad Industry Today Is Vastly Superior to When These Exemptions Were Adopted: Further Indication That These Exemptions Are Unnecessary. Even if the Board were to be of the view that the financial condition of the railroad industry is relevant to the availability of legal remedies at the Board for commodities or services now subject to class-wide exemptions, the fact is that the financial condition of the modern railroad industry has never been better (as the Report issued by the Senate Commerce Committee on September 15, 2010 shows beyond a shadow of a doubt). Economic circumstances have changed fundamentally since the 1980s, when the class-wide exemption process was created by the Staggers Rail Act and implemented by the Interstate Commerce Commission. During the 1980s, as the major railroads scrambled for market share and particularly before the era of consolidation, there was more robust competition in the freight rail industry for some rail customers. There were also tariff-filing requirements incumbent on the railroads, which were removed by the ICC Termination Act of 1995. Thus, we believe that the

extraordinary class-exemption process is a relic of an era that has long-since passed and should be discarded.

4. The Real Key to Improved Financial Performance of the Railroads Was Consolidation and Improved Productivity of the Freight Railroads Themselves. What we believe was "instru mental" to the improved financial health of the railroad industry, in addition to their market-pricing power, was the improved operational performance of the railroad industry over the last thirty years.[2] Following partial deregulation in 1980, the railroads cut the fat out of their operations, focusing their systems on the economic realities of the late 20th and 21st centuries; thousands of miles of underutilized track was abandoned; total employment was reduced significantly; the operating rights to thousands of miles of track were transferred to short-line railroads; more- efficient locomotives were purchased; railcar ownership was often transferred to private car owners and, finally, although we do not applaud this development, billions of dollars of costs that were previously borne by the freight railroads were transferred to rail customers. Many of these

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[2] See, *e.g.*, "Railroa ds: 12-Month 33 Percent Boost in Profits" ("The STB said the railroads' revenue ton-miles hauled was up just 5 percent against the 33 percent increase in net income, meaning the increased profits were the result of higher freight rates (linked to shipper captivity) and productivity improvements (fewer employees doing more work)."), accessible at http://www.utu.org/worksite/detail_news.cfm?ArticleID=53732, relying on http://www.stb.dot.gov/econdata.nsf/c1f494991e44922185256605006 0ff1e?OpenView and for 3Q10 at http://www.stb.dot.gov/econdata.nsf/c1f494991e44922185256605006 0ff1e/347bfc2f6f92590e852577d70063834e/$FILE/QA%20FILE%20Selected%20Earnings%20Q3%202010.pdf

productivity improvements were occasioned by competitive pressures while competition between the railroads was more robust. However, the loss of rail-to-rail competition that the ICC and STB permitted through consolidations and their rulings on some key issues has had the effect of increasing railroad market power.. Now that the railroad industry is so healthy, there is no reason to retain unnecessary barriers that prevent rail customers from obtaining relief from the Board.

The partial deregulation that began under the Railroad Revitalization and Regulatory Reform Act of 1976 through exemptions was institutionalized and expanded through the basic partial deregulation provisions of the Staggers Rail Act of 1980. Even if all exemptions are removed, rail customers can only obtain relief from the Board if they are "captiv e" or subject to an unreasonable rail practice. Thus, removing exemptions does not open the door to more robust regulation by the Board. Rather, removing exemptions only removes an unnecessary barrier in a rail customer's qu est for relief where justified: petitioning the Board for a waiver from the class exemption.

5. <u>The Possibility of Revocation of the Exemptions Does Not Justify Continuation of Exemptions</u>. The Board and the railroads may respond that "[d]espite class exemptions, the Board has granted partial revocation of those exemptions if need be to provide relief to rail customers in appropriate circumstances." It is true that, in a relative handful of instances since the

class exemptions were adopted, the ICC or the Board has partially revoked a class exemption to allow a rail customer limited access to the Board. But these waivers have occurred infrequently since the class exemptions were adopted. If the argument is that the Board would, inevitably, partially revoke an exemption to provide relief to all market-dominant shippers or other shippers deserving relief, then the class exemptions seem to serve no purpose. If, on the other hand, petitions for waivers from exemptions are not automatic, then an unnecessary uncertainty and resulting barrier to a rail customer achieving relief from the STB has been erected. The fact is that one reason many rail customers confronted by a class exemption have not sought relief from the Board is the cost and uncertainty associated with petitioning for a waiver of that exemption. The existence of the class exemption can only mean to a rail customer that the Board is inclined to believe that sufficient competition exists to protect the rail customer and that obtaining a waiver is an up-hill battle.

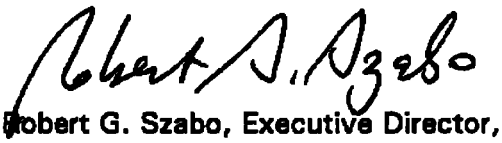
So, the exemptions have served to make it more difficult for captive shippers to obtain relief from unreasonable rates and practices, and for non-captive shippers to obtain relief from unreasonable practices, even where the shipper would otherwise be entitled to relief.

Conclusion

CURE appreciates the Board opening this proceeding and conducting this inquiry, which is appropriate for the reasons stated by the Board in its

Notice. CURE encourages the Board to repeal all of the class-wide exemptions discussed herein, for the reasons stated above. If the Board does not repeal all of the class-wide exemptions, it should, at a minimum, set an expiration date of no longer than five years for any such exemption, so that each such exemption must be reconsidered periodically to determine if it should remain in effect.

Respectfully submitted,



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